

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

BLUM SAN LEANDRO

Employer

and

Case 32-RC-267242

**UNITED FOOD & COMMERCIAL WORKERS,
LOCAL 5, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

Blum San Leandro (Employer) operates a cannabis dispensary in San Leandro, California. Petitioner, United Food & Commercial Workers, Local 5, AFL-CIO (Petitioner or Union) seeks to represent a bargaining unit of approximately 10 cash clerks, sales associates, and inventory clerks employed at the San Leandro facility.

A hearing was held before a hearing officer of the National Labor Relations Board (Board) on October 29, 2020.¹ The appropriateness of the bargaining unit is not in dispute, but at hearing the parties were allowed to present their position on the method of election, and specifically whether the election should be held manually at the Employer's facility or by mail ballot, given the ongoing COVID-19 pandemic. Petitioner seeks a mail or manual election to take place at the soonest practicable date, the Employer seeks a manual election.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Applying the Board's recent *Aspirus Keweenaw* decision to the circumstances in the instant case, I shall direct a mail-ballot election.

THE EMPLOYER'S OPERATIONS

The San Leandro facility is a retail cannabis dispensary open to the public, located in Alameda County, California. The State of California, Alameda County, and the municipality of San Leandro have COVID-related capacity restrictions in place for retail establishments, but the Employer's retail space is currently open for business and the public is allowed access to the building.²

¹ All dates 2020 unless otherwise indicated.

²State of California, *Stay at Home Q&A* (updated October 29, 2020), <https://covid19.ca.gov/stay-home-except-for-essential-needs/>; Alameda County Office of Emergency Services, *COVID-19*, <https://covid->

The Employer's storefront is the only business in the building where it is located. A parking lot for employees and customers is in front of the main entrance to the facility. Inside the main entrance is a lobby that allows access to several rooms, including a training room and the main sales floor. Off the main sales floor are employee only areas, including a break room and restrooms for staff and authorized visitors. The manager's office is located next to the break room.

The exact dimensions of the training room are not in the record, but the room has two access points, the entrance from the lobby and a second door that opens to the exterior of the building. The room is not open to the public except when the Employer is hosting a specific event. The Employer proposes utilizing the training room as the site for a manual election, and in the alternative proposes conducting a manual election outside the building on the Employer's property.

As a retail establishment open to the public during the pandemic, the Employer has taken steps to reduce the risk of infection among its employees and customers. This includes requiring employees to have their temperature checked when arriving at the facility and providing employees with personal protective equipment (PPE), including face shields, gloves, and hand sanitizer. The facility is regularly cleaned in accordance with health official guidelines, and plexiglass shields have also been installed in the retail area. In support of its argument for a manual election the Employer commits to extending these precautions to the polling place, whether the training room or outside. None of the Employer's employees have tested positive for COVID-19 during the pandemic.

METHOD OF ELECTION

The COVID-19 pandemic has had a profound impact on daily life in the United States. Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted on the way the Board conducts its elections. The Centers for Disease Control and Prevention (CDC), has determined "[t]he best way to prevent illness is to avoid being exposed to the virus," as there is currently no approved vaccine or antiviral treatment, and "[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19."³ According to the CDC, "[t]he virus that causes COVID-19 is spreading very easily and sustainably between people" and "the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread."⁴ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel,

[19.acgov.org/sip.page?](https://www.acgov.org/sip.page?); City of San Leandro, *City of San Leandro COVID-19 Updates* (updated September 28, 2020), <https://www.sanleandro.org/c19/>.

³ CDC, *Protect Yourself* (updated November 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Department of Homeland Security, *Predicting the Decay of SARS-CoV-2 in Airborne Particles* (July 16, 2020), <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet>.

⁴ CDC, *How it Spreads* (updated October 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people.⁵

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”⁶ The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.”⁷ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”⁸

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board’s longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.⁹ However, a Regional Director may

⁵ CDC, Protect Yourself (updated November 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁶ CDC, Considerations for Election Polling Locations, (updated October 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”); see also California Office of the Governor of the State of California, *Executive Order N-64-20* (May 8, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”).

⁷ CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (updated October 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

⁸ CDC, *Running Errands* (updated November 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

⁹ I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April, with many Regional Directors, including myself, directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General Counsel issued a memorandum titled “Suggested Manual Election Protocols,” *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

The Board ordered this new guidance would be applied retroactively to all pending cases, including this case.

After careful examination of the record, the parties’ respective positions, and the current state of the COVID-19 virus in California and Alameda County, where the San Leandro facility is located, I have determined that a mail-ballot election is the appropriate option because the 14-day trend in the number of new confirmed cases of

COVID-19 in Alameda County is increasing. In reaching this decision, I have applied the six considerations set forth in *Aspirus Keweenaw*, *supra*, to the facts of this case.

Applying these factors, I first note that the Regional office is not currently in mandatory telework status. I have addressed the second factor below as it is determinative in this case. Regarding the third factor, I find no state, county or local measure regarding maximum gathering size would be implicated by a manual election. Finally, I find the Employer's commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*, and there is no basis to find a COVID-19 outbreak is ongoing at the Employer's facility. Based on the above, and the lack of any other compelling circumstances, I conclude the method of election here is a question of the extent of COVID-19 in the community, the second consideration.

In addressing the second consideration – whether the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

Here, regarding the first part, the Johns Hopkins University COVID-19 Status Report for Alameda County, California on November 19 reports a (-1) value of 272 cases, and a (-14) value of 48 cases, an increase.¹⁰ Regarding the second part, Alameda County does not publish a 14-day testing positivity rate, and as such the data for California as a whole is the best available. I note that on November 19, 2020, the California Department of Public Health issued its "Limited Stay At Home Order" due to "unprecedented rate of rise in increase in COVID-19 cases across California," citing unparalleled increase in case rate rise of about 50 percent during the first week in November. As of this writing, California's 14-day positivity rate is 5.2%, an increase of 1.9% from 14 days ago.¹¹ The Board in *Aspirus* stated if either consideration was met it suggests the propriety of a mail-ballot election. Here, I find the increasing number of new confirmed cases in Alameda County makes a mail ballot election appropriate.

CONCLUSIONS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹²

¹⁰ <https://bao.arcgis.com/covid-19/jhu/county/06001.html>

¹¹ <https://coronavirus.jhu.edu/testing/testing-positivity>

¹² During the hearing the parties stipulated to the following commerce facts:

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Cash Clerks, Sales Associates (Level I & II), and Inventory Clerks employed by the Employer at its facility located at 1915 Fairway Drive, San Leandro CA 94577;

Excluded: All other employees, confidential employees, office clerical employees, guards, and supervisors as defined by the National Labor Relations Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by UNITED FOOD & COMMERCIAL WORKERS, LOCAL 5, AFL-CIO.

A. Election Details

I have determined that a mail ballot election will be held. Petitioner has waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on December 8, 2020**, ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300-N Oakland, CA 94612-5224. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by December 15, 2020, should communicate immediately with the

The Employer, Blum San Leandro, is a California corporation, with an office and place of business located in San Leandro, California. It is engaged in the business of dispensing cannabis products. During the last twelve months, the Employer derived gross revenue in excess of \$500,000, and during that same period purchased and received goods or services in excess of \$5,000, directly from businesses located outside the State of California.

National Labor Relations Board by either calling the Region 32 Office at **(510) 637-3300** or Nicholas L. Tsiliacos at (510) 671-3046 and request a ballot.

All ballots will be commingled and counted by the Region on January 6, 2021.¹³ In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **November 5, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(I) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Tuesday, November 24, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first

¹³ If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this

decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California this 20th day of November 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
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